Supreme Court, U.S.
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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CITY OF CHICAGO,
Petitioner,
v.
SYLVIA EVANS,
Respondent.

CITY OF CHICAGO,
Petitioner,
v.
BERTHA BALARK, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

SUSAN S. SHER
Corporation Counsel
of the City of Chicago
LAWRENCE ROSENTHAL
Deputy Corporation Counsel
BENNA RUTH SOLOMON *
Chief Assistant Corporation Counsel
30 N. LaSalle Street
Room 800
Chicago, Illinois 60602
(312) 744-7764
Attorneys for Petitioner
* Counsel of Record

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QUESTION PRESENTED

Whether the entry of a consent decree that is later vacated because it was based on a mistake of law makes a civil rights plaintiff a "prevailing party" entitled to an award of attorney's fees under Section 1988.

PARTIES TO THE PROCEEDING

The petitioner in both of the now-consolidated cases is the City of Chicago. The respondent in *City of Chicago v. Evans* is Sylvia Evans, individually and on behalf of a class of certain tort judgment creditors of the City. The respondents in *City of Chicago v. Balark* are Bertha Balark, Anne Balark, Dane Balark, and Dana Balark, individually and on behalf of a class of certain other tort judgment creditors of the City. Although both *Evans* and *Balark* were filed against a number of City officials as well—Michael A. Bilandic, Clark Burris, William R. Quinlan, and Daniel J. Grim—these officials are no longer involved in the litigation, and the fee award at issue in this case would run only against the City.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, the City of Chicago, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, at 1a-13a, is reported at 81 F.3d 658 (7th Cir. 1996). The opinion of the district court, App., *infra*, at 14a-15a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1996. The City's timely petition for rehearing was denied on May 2, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1988 provides that in any action to enforce 42 U.S.C. § 1983, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT

1. The background of this case, which now concerns only attorney's fees, has unfolded during its four trips to the Seventh Circuit over the course of nineteen years of litigation. It began as a challenge to the manner in which the City of Chicago paid its tort jugments. Before 1983, the City paid persons holding tort judgments under $1000 and all contract judgments promptly; but persons holding larger tort judgments would be paid in the order in which those judgments were entered, until the appropriated funds ran out. Because the tort judgment fund was chronically underfunded, there was a lengthy wait—almost four years, on average—for payment of larger tort judgments. Interest accrued on these judgments at the statutory rate of 6%, but that was substantially less than market rates. See *Evans v. City of Chicago*, 10 F.3d 474, 475 (7th Cir. 1993) (en banc) (plurality opinion), cert. denied, 114 S. Ct. 1831 (1994) ("*Evans III*").

These cases were filed in 1977 and 1979 as class actions challenging the City's payment practices.[1] The com-

[1] When the classes were certified, the *Evans* class included tort judgment creditors holding judgments larger than $1000 who had not been paid by the end of the fiscal year following entry of their judgments. The *Balark* class included tort judgment credtiors hold-

plaints, filed under 42 U.S.C. § 1983, alleged violations of due process and equal protection. The district court, by summary judgment, found in favor of the plaintiff classes on both grounds: due process because of what the court regarded as a state-law right to immediate payment, and equal protection because of the perceived absence of any rational basis to distinguish between large and small judgments.

On the City's appeal, the Seventh Circuit affirmed on equal protection grounds and forbade the City to distinguish between large and small tort judgments in paying judgments. *Evans v. City of Chicago*, 689 F.2d 1286, 1299-1300 (7th Cir. 1982) ("*Evans I*"). The court also held that respondents had a protectable property interest in prompt payment, see *id.* at 1297, but vacated the portion of the district court's order resting on due process because respondents lacked standing on that issue. See *id.* at 1299. As the *Evans III* plurality later noted, dicta in the opinion strongly implied that the City had deprived respondents of due process. See 10 F.3d at 475.

2. The case returned to the district court, where

> the district judge told the parties and their lawyers that the combination of his opinion and ours condemned Chicago's practices en toto. He directed the parties to negotiate appropriate relief. They complied, and the judge approved a consent decree eliminating the distinction between large and small judgments, requiring all judgments to be paid in order of their entry, and providing that the Mayor must ask the City Council to appropriate enough money to pay all judgments promptly.

Evans III, 10 F.3d at 475 (plurality opinion). Following a trial on damages, the City appealed a second time, and,

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ing judgments larger than $1000 who had been holding their judgments less than two fiscal years, but who also had not yet been paid. The cases were long ago consolidated, and there is no longer any legal significance to the distinction between the classes as certified.

among other things, argued that *Evans I* should be overruled. This time, the court concluded that the City had a rational basis to pay small judgments before large ones, namely, reducing delays for large numbers of judgment creditors. See *Evans v. City of Chicago*, 873 F.2d 1007, 1014-16 (7th Cir. 1989), cert. denied, 495 U.S. 956 (1990) ("*Evans II*"). Thus, the court held that the Equal Protection Clause did not forbid the City from treating tort judgments differently from other judgments, from paying judgments slowly, or from paying small judgments out of order. *Id.* at 1014-18. For this reason, the panel, with the acquiescence of the full court, explicitly overruled *Evans I*, see 873 F.2d at 1008 n.*, calling it "clearly erroneous." *Id.* at 1016. As the second panel explained.

> The district judge advanced some worthy ideas, but they are for the City's self-determination, and will not be imposed by this court. It is regrettable that this matter which has lingered so long now takes a new and possibly unexpected turn, but what we now view as error must be arrested even at so late a date. Improvements in this situation are better left to the state and municipal governments.

Id. at 1017-18. The court also held that the due process claim had not survived to that stage of the litigation. See *id.* at 1012 n.11, 1018 n.15.

3. The case returned to the district court, where respondents' motions for attorney's fees were pending. Respondents argued that, despite their defeat in *Evans II*, they were still prevailing parties because they had obtained the consent decree. The City thereupon moved to vacate the decree under Fed. R. Civ. P. 60(b)(5). The district court modified the decree instead, reasoning that *Evans II* had not addressed respondents' claimed entitlement to prompt payment as a matter of constitutional law. Under the court's order, the decree no longer required the City to pay judgments in any particular order but still required all judgments to be paid promptly.

The City again appealed. A panel of the Seventh Circuit initially affirmed the district court's refusal to vacate the consent decree. *Evans v. City of Chicago*, 995 F.2d 1393 (7th Cir. 1993). Judge Easterbrook dissented. He explained that the decree was the fruit of *Evans I* and that permitting respondents to enjoy those fruits after *Evans I* had been repudiated "carries respect for the dead hand of the past altogether too far. Having admitted in 1989 our mistake of 1982, we should relieve the parties of the consequences." *Id.* at 1403 (dissenting opinion).

The City petitioned for en banc review, and the full court reversed, holding that since *Evans I* had been overruled, there no longer existed any basis to hold the City to the terms of the consent decree. The plurality opinion, written by Judge Easterbrook, set forth two reasons why the consent decree should be vacated: first, it was based on the discredited decision in *Evans I*, see 10 F.3d at 476-77, and second, it protected no substantial claim of federal right—neither equal protection nor due process, see *id.* at 480-82. Judge Ripple agreed that the decree should be vacated, since *Evans II* had repudiated any equal protection theory to support a decree and respondents had abandoned their due process theories. See *id.* at 483 (concurring opinion). The court ordered the district court to vacate the consent decree. *Id.* at 483 (plurality opinion).

4. Again the case returned to the district court, where the consent decree was vacated. Respondents again renewed their petitions for attorney's fees. The district court held that respondents were not entitled to attorney's fees, saying "it appears to this court that the City is correct in its contention that, having ultimately lost the case, plaintiffs cannot be considered prevailing parties." App., *infra*, at 15a (citing *Palmer v. City of Chicago*, 806 F.2d 1316, 1322-23 (7th Cir. 1986), cert. denied, 481 U.S. 1049 (1987)).

Now respondents appealed, and the Seventh Circuit reversed. The court expressed its concern that "to deny attorney's fees whenever subsequent events cause the court

to set [a consent] decree aside . . . would seriously undermine § 1988 in consent decree cases." App., *infra*, at 12a. The court observed:

> At an obvious level, as the district court recognized, plaintiffs qualify easily [as prevailing parties]: they obtained a consent decree that was in force for ten years; the decree addressed precisely the concerns they had brought before the district court about the way in which the City was paying judgments; and the City changed its behavior, perhaps permanently. We must therefore consider whether anything exists that would defeat their ability to collect fees.

Id. at 9a. In finding no basis to deny respondents fees, the court noted that they had obtained a judicial decree concluding a portion of the litigation. See *id.* at 12a. On this basis, the court distinguished *Hewitt v. Helms*, 482 U.S. 755 (1987), which had held that fees are not available to a plaintiff who achieves a favorable, beneficial interlocutory ruling in a case that ultimately ends with a judgment against him. In the court's words,

> Far from losing on all their claims, plaintiffs worked for and won a consent decree that remained in force for a decade. The City invites us to take an *ex post* view of all consent decrees (and injunctions, we suppose), and to deny attorney's fees whenever subsequent events cause a court to set the decree aside in whole or in part under Rule 60(b). Such a rule would seriously undermine § 1988 in consent decree cases, however, and we decline to take such a step. . . . How can one say that the plaintiffs did not prevail when their decree governed the parties' behavior for ten years, and the termination is prospective only? The only possible perspective from which the entitlement to fees can be considered is at the time the final judgment determining who prevails is entered (taking into account any appeals in accordance with *Palmer*).

App., *infra*, at 12a-13a. The court also noted that we had acknowledged that "had plaintiffs chosen to petition for

fees after the entry of the consent decree . . . the district court may well have granted them fees . . . ." *Id.* at 13a. The court concluded:

> The City's only error is in assuming that the fee petition is different, as a matter of law, because the district court considered it after the decree had been terminated under Rule 60(b)(5). It is not, and plaintiffs are entitled to the fees that relate to their success in obtaining a ten-year consent decree.

Ibid. The court did not reach respondents' alternative argument that they were entitled to fees under a catalyst theory. *Id.* at 7a.

REASONS FOR GRANTING THE PETITION

Section 1988 entitles only "prevailing parties" to attorney's fees. As this Court has interpreted this requirement, the plaintiff prevails "when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992). Thus, "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties . . . ." *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 792-93 (1989). See also *Rhodes v. Stewart*, 488 U.S. 1, 3-4 (1988) (per curiam); *Hewitt v. Helms*, 482 U.S. 755, 760-61 (1987).

Our argument to the court below—and our submission here—is straightforward. Plaintiffs who "prevail" only for a time, as a result of an erroneous ruling that is later rectified, are not prevailing parties. That is the teaching of *Hewitt v. Helms*, in which this Court reversed an award of attorney's fees premised on the theory that a favorable interlocutory ruling made the plaintiff a prevailing party. The court of appeals, however, rejected our reliance on *Hewitt* and the prior holdings both within and without the Seventh Circuit because respondents had obtained a con-

sent decree, not merely a favorable interlocutory ruling. We have never doubted that securing a settlement or consent decree on favorable terms can make the plaintiff a prevailing party under *Maher v. Gagne*, 448 U.S. 122 (1980). Our point is that when the only thing a plaintiff can point to as the basis for prevailing party status is an earlier error of the court, that plaintiff has not prevailed.

The court of appeals' holding to the contrary warrants plenary review, if not summary reversal. This lawsuit vindicated no legal rights of respondents; at best it produced a consent decree after the erroneous ruling in *Evans I*, and that consent decree has been vacated precisely because it was based on a mistake of law. That decree cannot support an award of fees. Section 1988 surely should hold nothing for plaintiffs who bring meritless suits and improperly constrain the defendant for a period of time until the court corrects its own error in initially finding for the plaintiff. Thus, respondents here should not be rewarded for having convinced the Seventh Circuit to recognize a federal right that does not exist, even if they were able to parlay that ruling into a consent decree with a local government.

The contrary ruling below can be squared with neither *Hewitt v. Helms* nor decisions in other circuits holding that erroneous rulings cannot support an award of attorney's fees. And municipal taxpayers should not be required to fund the consequences—here, perhaps nearly $1 million in fees—of the erroneous rulings of federal courts. Such a result is a great affront to federalism. Local governments appropriately pay the fees of plaintiffs who vindicate federal rights, but surely no principled view of federalism requires them to pay plaintiffs to produce decrees that are based on mistaken rulings and protect no federal rights.

1. Respondents' only "victories" here were the decision in *Evans I*, later overruled in *Evans II*, and the consent decree, later vacated in *Evans III* because it was

based on the erroneous decision in *Evans I*. In *Hewitt v. Helms*, the Court addressed the "peculiar-sounding question whether a party who litigates to judgment and loses on all of his claims can nonetheless be a 'prevailing party' for purposes of an award of attorney's fees." 482 U.S. at 757. There, the Court considered whether a simple statement of rights—that Helms had been denied due process before being disciplined in prison—was sufficient for prevailing party status after it was determined that damages were barred by qualified immunity and injunctive relief was moot because of Helms's release from prison. Unsurprisingly, the Court's answer was no: "Respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Id.* at 760. As the Court explained, "a favorable judicial statement of law in the course of litigation that results in a judgment against the plaintiff does not suffice to render him a 'prevailing party.' Any other result strains both the statutory language and common sense." *Id.* at 763.

The Fourth, Sixth, Tenth, and Eleventh Circuits have also rejected attempts to transubstantiate a loss into a victory by holding that a plaintiff's ability to procure an erroneous ruling in its favor will not support an award of attorney's fees.

In *Smith v. University of North Carolina*, 632 F.2d 316 (4th Cir. 1980), Smith brought an employment discrimination case and obtained a preliminary injunction preventing the University from firing her, but lost her case after trial on the merits. While acknowledging that the preliminary injunction had properly issued, the Fourth Circuit held that it did not entitle Smith to attorney's fees as a prevailing party since she in fact had no legal right to keep her job:

> [J]ust because an injunction was issued properly does not signify that a defendant must incur the costs of its issuance when a court has eventually proclaimed

> him to be innocent of discriminatory conduct. While we recognize that the attorney's fees provision was designed to encourage plaintiffs of limited means to bring meritorious lawsuits, nonetheless, in the end, it was determined that Smith's suit was not meritorious. . . . If we were to hold [that the plaintiff had prevailed,] we essentially would be requiring a defendant, who prevailed on the merits, to finance a plaintiff's unsuccessful claim against him. There is nothing in the statute to suggest that an innocent defendant should be assessed a portion of a plaintiff's litigation costs.
>
> Litigation is not without its financial risks. A fully successful defendant should not be required to reimburse an unsuccessful plaintiff for his legal gamble. The attorney's fees provision was intended to assist those plaintiffs who were successful in prosecuting suspected violators of Title VII, not those who were not.

Id. at 352-53, Here too, the City was ultimately successful; after *Evans II* all of respondents' legal claims had been disposed of adversely to them, and after *Evans III* even the consent decree was vacated. The City and its taxpayers should not be required to finance a suit that "was not meritorious."

To similar effect is *Harrington v. Vandalia-Butler Board of Education*, 585 F.2d 192 (6th Cir. 1978), in which the district court found that Harrington had been discriminated against but could establish no right to backpay, and the statute did not then permit recovery of compensatory or punitive damages. See *id.* at 194-97. When the district court proceeded to award her attorney's fees, the court of appeals reversed:

> Mrs. Harrington, however, never had any right to any relief under the statute at the time suit was brought. Under such circumstances it is not possible to determine that plaintiff is a prevailing party and is thereby permitted an award of attorney's fees. An

> opposite result would, in our judgment, run counter to the statute and would only serve to encourage fruitless litigation.

Id. at 198 (footnote omitted).

In *Doe v. Busbee*, 684 F.2d 1375 (11th Cir. 1982), the plaintiffs won preliminary and permanent injunctions and a declaratory judgment requiring the State of Georgia to provide Medicaid reimbursement for all medically necessary abortions administered to eligible women in that State. See *id.* at 1377. While the State's appeal was pending, the plaintiffs sought an award of fees under Section 1988, but before the district court ruled on their fee petition, this Court decided *Harris v. McRae*, 448 U.S. 297 (1980), and *Williams v. Zbaraz*, 448 U.S. 358 (1980), which made clear that the district court's judgment in plaintiffs' favor was erroneous. The district court nevertheless awarded plaintiffs attorney's fees. See *id.* at 1378. The court of appeals then remanded the case, and on remand, the district court vacated its declaratory judgment and injunction order but refused to vacate the award of attorney's fees. See *ibid.* The Eleventh Circuit reversed, holding that plaintiffs were not prevailing parties in the litigation. "Their successes were merely temporary, and any benefit flowing from their successes in the district court was awarded under a mistake of law." *Id.* at 1381. Under those circumstances, the Eleventh Circuit held that plaintiffs did not prevail—even though 1,800 women received Medicaid-reimbursed abortions while the injunctions were in effect.

Finally, in *Stewart v. Donges*, 979 F.2d 179 (10th Cir. 1992), the defendant police officer filed a motion for summary judgment on qualified immunity grounds. When the motion was denied, he took an interlocutory appeal and moved the district court to stay the trial. The stay was denied and the trial was held. The Tenth Circuit later held that the district court should not have conducted the trial. *Stewart v. Donges*, 915 F.2d 572 (10th Cir.

1990). On remand, the case was settled, and the district court then made a fee award that included time spent on trial preparation and on the trial itself. The Tenth Circuit overturned these aspects of the fee award, holding that the district court's erroneous decision to hold the trial could not support an award of fees for time spent on a trial that should never have been held: "Because the voiding of the trial rendered the trial a nullity from the outset, the Plaintiff cannot be considered a 'prevailing party' under § 1988 . . . ." 979 F.2d at 182.

The lesson of these decisions is that a mistake made by a court and later corrected cannot confer a windfall on an otherwise undeserving plaintiff in the form of prevailing party status. Plaintiffs who win something for a time, but only by mistake, do not prevail—once the error in their favor is rectified, they cannot be said to have changed the legal relationship between the parties. The Seventh Circuit itself once understood this point—in *Palmer v. City of Chicago*, 806 F.2d 1316 (7th Cir. 1986), cert. denied, 481 U.S. 1049 (1987), it had held that a plaintiff who obtains only a preliminary injunction that is later vacated for lack of standing is not entitled to an award of fees. See *id.* at 1321-23. Accord *Kansas Health Care Association, Inc. v. Kansas Department of Social & Rehabilitation Services*, 31 F.3d 1052 (10th Cir. 1994); *Ward v. County of San Diego*, 791 F.2d 1329, 1333-34 (9th Cir. 1986), cert. denied, 483 U.S. 1020 (1987). See also *Alioto v. Williams*, 450 U.S. 1012, 1013-14 (1981) (Rehnquist, J., dissenting from denial of certiorari). *Hewitt v. Helms* is even clearer. There the Court did not quarrel with the Third Circuit's statement that Helms's rights had been violated—there was no mistake, no error of law, and no lack of legal merit to Helms's case. Yet because Helms held nothing of value at the conclusion of the litigation, this Court held that he did not prevail. Indeed, no decision of any court awards fees in circumstances like this case.[2]

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[2] Balark's counsel agrees. His public comment on the decision below was "[t]his is the only case of its kind in the country that addresses whether [plaintiffs] are entitled to fees where an under-

Respondents have not prevailed in the sense required by this Court's precedents—they have not altered the legal relationship between the parties. At present, the City is fully entitled to resume its prior practices of paying larger judgments slowly and paying smaller judgments out of order. The consent decree is gone, and so are all of respondents' legal claims. The *Evans III* plurality rejected all of those claims on their merits, see 10 F.3d at 480-82; Judge Ripple rejected respondents' equal protection theory and concluded that plaintiffs had abandoned the due process claims, see *id.* at 483 (concurring opinion). Thus, all of respondents' claims have failed to alter the legal relationship between the parties. While as a matter of policy, we currently adhere to most of the requirements of the consent decree, as a matter of law we are not compelled to do so. Respondents' request for fees therefore should have been denied because they are not prevailing parties.[8]

2. The court of appeals' error is more fundamental still. The court has announced a test for fees that turns on a fortuity, and an inauspicious one at that—a plaintiff's ability to lull a federal court into an error that produces a consent decree.

The only distinction the Seventh Circuit offered of *Hewitt* and the other authorities on which we relied was

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lying cause has been subsequently reversed." John Flynn Rooney, *Despite Demise of City Decree, Attorneys Win Claim for Fees*, Chicago Daily Law Bulletin, April 8, 1996, at 1. Indeed, counsel called this case "precedent-setting." *Ibid.*

[8] The court below did not address respondents' alternative catalyst theory. See App., *infra*, at 7a. This theory would presumably remain open to respondents on remand, although it has little chance of success under prevailing Seventh Circuit law. See *Palmer v. City of Chicago*, 806 F.2d at 1322 ("'If it has been judicially determined that defendants' conduct, however beneficial it may be to plaintiffs' interests, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense.'") (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978)).

that the consent decree here was not a mere interlocutory ruling that was later set aside on direct review, but rather a consent decree that had concluded respondents' claims for injunctive relief and had been entered "in an atmosphere of legal uncertainty both about the Due Process claim and about the extent of [the City's] obligations under the Equal Protection Clause . . . ." App., *infra*, at 12a. This does not distinguish the cases. The only reason that the City faced "legal uncertainty" was the erroneous decision in *Evans*—before *Evans I*, the City had refused to settle any of respondents' claims. Had the Seventh Circuit decided *Evans I* correctly—rejecting respondents' equal protection claims on their merits, as it did in *Evans II*, and their due process claims for lack of standing, as it did in *Evans I*[4]—there would have been no uncertainty and no consent decree.

Thus, although respondents obtained a final judgment, that judgment was based on an error of law—namely, *Evans I*. And it is clear that, but for that error, the consent decree would not have been entered. As Judge Easterbrook put it in his dissent from the panel opinion in *Evans III*, "[t]he decree was founded on a blunder committed by this court." 995 F.2d at 1404. See 10 F.3d at 476-77 ("[t]his decree is 'based' on *Evans I*") (plurality opinion). Now respondents are to be paid for producing the consent decree. But there is no reason to treat the erroneous decree, once it has been vacated, any differently from an error that is corrected on direct review. Simply because the error achieved finality does not make it any less wrong. Even respondents have long ago stopped defending *Evans I*, and they no longer claim

[4] The due process claim lacks merit as well. Neither a municipality's failure to pay judgments as promptly as state law may require or its failure to give judgment creditors individualized notice and hearing before deciding whether to appropriate enough money to pay all judgments promptly violates the Due Process Clause. *See Evans III*, 10 F.3d at 481-82 (plurality opinion).

entitlement to any relief on the merits. Here, as in the other cases we cite, awarding attorney's fees to plaintiffs whose lawsuit presses no meritorious federal claim, and whose only victories were the product of erroneous rulings, "would only serve to encourage fruitless litigation," *Harrington*, 585 F.2d at 192, and to require defendants to finance unsuccessful plaintiffs, see *Smith*, 632 F.2d at 352-53. Although losing defendants appropriately pay fees, winning defendants do not.

What is more, the bill that the City's taxpayers must now foot for the Seventh Circuit's error is steep. The fee petitions filed in the district court since the decision below seek not only fees for all time spent producing the erroneous decision in *Evans I* but also the consent decree that never should have been entered and has since been vacated. And as this Court has held, prevailing parties are entitled to some compensation for the time-value of fees, whether by application of current rates or otherwise. See *Missouri v. Jenkins*, 491 U.S. 274, 283-84 (1989). Some courts use interest from the date of the merits judgment as an alternative. See, *e.g.*, *Fleming v. County of Kane*, 898 F.2d 553, 565 (7th Cir. 1990); *Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542, 545 (5th Cir. 1983). Here the petitions seek fees from the date the complaints were first filed in 1977 and 1979—or between seventeen and nineteen years. Prevailing parties are also entitled to fees for the time spent litigating the fee award. See, *e.g.*, *Thompson v. Gomez*, 45 F.3d 1365, 1366 (9th Cir. 1995); *Ustrak v. Fairman*, 851 F.2d 983, 990 (7th Cir. 1988). All told respondents' fee petitions seek about $950,000—for achieving no alteration at all in the legal relationship with the City.

3. The court of appeals candidly admitted its concern about the effect that it thought denying fees in circumstances like this would have on Section 1988 in consent decree litigation. The court rejected what it called an "*ex post* view of consent decrees" that would deny fees "whenever subsequent events cause a court to set the decree

aside in whole or in part under Rule 60(b). Such a rule would seriously undermine § 1988 in consent decree cases, . . . and we decline to take such a step." App., *infra*, at 12a. This concern is misplaced, for at least four reasons.

First, the court's free-floating policy analysis that grants fees to plaintiffs who were for a time, but plainly are no longer, prevailing parties finds no roots in the language of Section 1988 or any of this Court's cases and is not properly relied on by the inferior federal courts. The statute and the cases require a plaintiff to "prevail," not simply to obtain a temporary victory by mistake, especially where it has since been undone.

Second, ours was not at all an *ex post* view. Ours was, in fact (in corresponding parlance), an *ex ante* view—we asked the court to approach the fee question by asking what entitlement respondents would have had if *Evans I* had come out correctly—if the court had never erred. It is the court below that has taken the *ex post* view, asking not whether respondents should be awarded fees on any traditional basis—such as whether they have altered the legal relationship between the parties—but instead noting that respondents had obtained a consent decree that had lasted for ten years and then asking "whether anything exists that would defeat their ability to collect fees." App., *infra*, at 9a. This is a test used by no other circuit—and for good reason. It is simply not too much to expect civil rights plaintiffs to have something to show for their litigation efforts at the time they ask for fees. Such a requirement will not have an untoward effect on Section 1983 or 1988—"prevailing" is in fact the requirement imposed by the statute.

Third, even if the court below had asked the right question, it surely answered it wrong. Something does exist in this case that defeats respondents' ability to collect fees: the consent decree has been vacated. And acknowl-

edging this effect of the vacating of the consent decree does not undermine Section 1988 in consent decree cases. These respondents asserted no federally protected right. They brought two class actions, made three appearances before panels of the court of appeals, another before the en banc court, and came away with nothing. If they or others like them are dissuaded, that is just as well. The incentives posed by Section 1988 are well known; there is no reason to pervert them by awarding fees to losing plaintiffs as well as those who prevail. These respondents can be denied fees—without fear of undermining the legitimate role of Section 1988—because the consent decree obtained on the basis of *Evans I* has been vacated as the product of judicial error. Under the test announced by the court below, that should defeat a claim to fees.

Likely the court's concern was not limited to meritless litigation such as this, but was instead more typical consent decree litigation in which the decree is properly supported when entered, fees are awarded, and the litigation is complete. Later, the decree is vacated but not on any basis that impugns its validity—instead, it is vacated because the law has changed or the purposes of the decree have been fully achieved. See generally, *e.g.*, *Missouri v. Jenkins*, 115 S. Ct. 2038, 2048-49 (1995). This concern is simply inapplicable to this case. At a most basic level, it overlooks that a plaintiff who has compelled a defendant to honor a federal right has altered the legal relationship between the parties. Indeed, in such cases the decree is vacated because the relationship has been altered so completely that there is no longer a need to compel the behavior of the defendant. That does not mean that plaintiffs, like respondents here, who do no more than obtain erroneous rulings that are later vacated also deserve fee awards under Section 1988.

Thus, our position would not, as the court below feared, require a court "to deny attorney's fees whenever subsequent events cause a court to set the decree aside in

whole or in part." App., *infra* at 9a. Indeed, formulating the issue here in this way, perhaps more clearly than anything else, shows the Seventh Circuit's profound misunderstanding of what is at stake in this case. We have never suggested that the court should deny attorney's fees whenever there is a subsequent ruling setting the decree aside; rather our position is that a decree based on an error of law that is later recognized as such does not make a plaintiff a prevailing party merely because it took some time to rectify the error. In fact, in this case there was not even an intervening change in the law—*Evans II* held that *Evans I* was simply wrong, even at the time it was decided. No policy underlying Section 1988 requires civil rights plaintiffs to be compensated for producing erroneous rulings and decrees.

The court of appeals found it "interesting" that we had not attempted to recover the $60,000 in interim fees that we had earlier paid—the court thought that "the logic of [the City's] position would seem to compel just such an action on behalf of the taxpayers of Chicago." App., *infra*, at 13a.[5] With all due respect to the court below, concern about the impact on the taxpayers of the payment of $60,000 pales in comparison to the concern, if the judgment below stands, that we will be asked to pay nearly $1 million in fees as a result of the court's initial mistake in *Evans I*. The decision in this case simply perpetuates the error made in 1982 by the court in *Evans I* when it held that the City's delay in paying

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[5] In April 1987, after the entry of the consent decree and before *Evans II*, Balark's counsel obtained an award of $60,000 in interim fees. After *Evans II*, when we moved to vacate the consent decree and simultaneously opposed respondents' renewed attorney's fee petitions, we asked the court to order counsel to return the amount of the prior award. The district court denied this request, and as the court of appeals correctly notes, we have not pursued it. As we advised the court at oral argument, it was as much an attempt to avoid further litigation—*Evans V*, we supposed—over the issue of the return of fees previously paid.

large tort judgments violated the Equal Protection Clause. In light of the decision of the en banc court that the consent decree rested on the clear error of *Evans I*, it is unconscionable that respondents should receive fees for inducing the court to err in the first place.

In any event, the City has not requested repayment of the interim fee reward here, nor is any question of a civil rights defendant's ability to recoup fees previously paid pursuant to a final judgment presented. What is more, this question may never need to be decided. Although several consent decrees have been vacated in recent years because of a change in the law or because the goals have been achieved, there is not a single reported case in which the issue about a return of fees has been litigated. So far as appears, it has not occurred to any civil rights defendant to make this request. More important, should such a request ever be made, it will be guided by far different considerations from those at play here. Thus, a ruling in this case that further fees need not be paid after the decree is vacated simply will not bear upon these more typical cases in which fees are awarded before the consent decree is vacated. Here, the decree was set aside because it was based on a "clearly erroneous" decision—it does not reflect federal law and it never did. Accordingly, all the Court needs to decide this case is the simple proposition that because the decree on which the court relied to award fees was based on the court's error in *Evans I*, no fees can be based on it—judgments entered in error simply do not render the party who obtains and then loses that judgment a "prevailing party." That principle, however, will not reach cases in which the decree is set aside because of a subsequent change in the law or because it has been effectuated. In such cases, there will be no comparable error infecting the fee award.

4. Contrary to the explicit holding of the court below, it does matter whether, at the time the court considers a fee petition, the plaintiffs are able to point to an extant

judgment in their favor. See App., *infra*, at 13a. No court has ever awarded fees without some lasting benefit to the plaintiff; interlocutory, interim, temporary, or impermanent success, where the plaintiff later loses on the merits, has never before been enough for prevailing party status. Especially where, as in this case, the judgment for respondents was overturned on the ground that it never should have been entered at all, it cannot support an award of fees made after the judgment is vacated. We see no reason—and the court below identified none—why this simple and quite well-settled proposition should not apply to consent decrees as well as other aspects of temporary relief.

Simply put, there is no language or policy of Section 1988 that should require the taxpayers to pay to fund meritless Section 1983 litigation that should have been dismissed out of hand nineteen years ago, but instead, through the plain error of a federal court, leads to a consent decree that should never have been entered in the first place and has since been undone. "That is not the stuff of which legal victories are made." *Hewitt v. Helms*, 482 U.S. at 760. Indeed, as we explain above, Helms obtained a declaration that his rights were violated, *id.* at 761, and still he received no fees. Respondents have not even that—they attempted to enforce federal rights that they were never denied, and they were finally rebuffed. Before now, no court has ever held that a plaintiff should be compensated for inducing a federal court to err, and the decision below to that effect—the first of its kind—should not be allowed to stand.

The Seventh Circuit's conclusion that the taxpayers should pay respondents fees for producing a consent decree that never would have existed had that court decided *Evans I* correctly is demonstrably wrong—so wrong that the Court may wish to consider summary reversal. In our view, the interests of justice require overturning the ruling below, and summary disposition is well suited to the

task—the law is settled, the facts are not in dispute, and the decision is clearly in error. And if a case ever merited the exercise of the Court's supervisory power over the lower federal courts, it is one in which the taxpayers have been handed a nearly $1 million bill solely because of an erroneous decision of the court. Whether by plenary review or summary disposition, the judgment below surely should not stand.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted,

SUSAN S. SHER
Corporation Counsel
of the City of Chicago
LAWRENCE ROSENTHAL
Deputy Corporation Counsel
BENNA RUTH SOLOMON *
Chief Assistant Corporation
Counsel
30 N. LaSalle Street
Room 800
Chicago, Illinois 60602
(312) 744-7764
Attorneys for Petitioner

July 31, 1996

* Counsel of Record

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 95-1181 & 95-1182

BERTHA BALARK, *et al.*,
Plaintiffs-Appellants,

v.

CITY OF CHICAGO, a municipal corporation, *et al.*,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division
Nos. 77 C 1939, 79 C 2493 and 79 C 4119—
John F. Grady, *Judge*

ARGUED NOVEMBER 3, 1995—DECIDED APRIL 5, 1996

Before EASTERBROOK, DIANE P. WOOD, and EVANS, *Circuit Judges.*

DIANE P. WOOD, *Circuit Judge.* More than twenty years ago, Sylvia Evans settled a wrongful death action against the City of Chicago for $67,500. That lawsuit, and the later action brought by the Balark plaintiffs, gave rise to the litigation that now comes before this Court for the fourth time. In the Evans and Balark class actions,

the plaintiffs challenged the City's practice of paying tort judgments of $1,000 and less before it paid larger judgments. Between May 20, 1984 and June 29, 1994, the plaintiff classes and the City were parties to a consent decree that governed the order in which judgments would be paid, methods for funding payments, and ancillary matters. Eventually, for reasons that we explain below, the consent decree was vacated pursuant to Fed. R. Civ. P. 60(b)(5). The question before us today is narrow: are the plaintiffs entitled to attorneys' fees as "prevailing parties" under 42 U.S.C. § 1988 for their efforts in obtaining and maintaining the decree while it was in effect, or does the fact that they ultimately lost the decree defeat this claim? We conclude that parties who win a consent decree in a case brought under 42 U.S.C. § 1983 qualify as "prevailing parties," and thus may obtain appropriate attorneys' fees under § 1988, even if the decree is later modified or terminated pursuant to Rule 60(b).

I

The relevant facts for present purposes have more to do with the procedural history of this case than with the underlying claims. The Evans plaintiffs and the Balark plaintiffs brought separate suits against the City under § 1983 raising constitutional challenges to the City's delays in paying tort judgments and its practice of paying smaller judgments ($1000 or less) before earlier-entered larger ones. The district court certified two distinct classes: the Evans class included tort judgment creditors holding judgments larger than $1,000 whose payments were more than one year overdue, and the Balark class included tort judgment creditors holding judgments larger than $1,000 whose payments were less than one year overdue. On January 28, 1981, the district court consolidated the two actions for disposition and entered partial summary judgment for both. The judgment was broad in scope, striking down several Illinois laws that authorized the City's practice, finding violations of both the Equal

Protection and Due Process clauses of the Constitution, and enjoining the City's practice of paying the judgments of $1,000 or less before earlier-entered larger judgments. See *Evans v. City of Chicago,* 689 F.2d 1286, 1291 (7th Cir. 1982) (*Evans I*).

Plaintiffs appealed and the City cross-appealed from the judgment. Applying the equal protection analysis set forth in *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1 (1973), the Court was able to discern no rational basis for the City's decision to create two categories of tort judgment holders, those with "large" and those with "small" judgments. *Evans I* at 1299-1300. It therefore upheld most of the district court's order, with the exception of a section declaring Ill. Rev. Stat., ch. 85, § 9-104(b), unconstitutional and setting forth minimum procedural safeguards.

Upon remand to the district court, the parties negotiated the consent decree that underlies the current appeal. On May 31, 1984, the district court approved a consent decree that required the City to pay all judgments in the order in which they were entered, and to pay all judgments promptly. It also required the City to appropriate sufficient funds annually to satisfy its anticipated tort liabilities. The decree was prospective in nature, in that it expressly left open all claims for damages. It covered all tort judgments that remained unpaid as of December 31, 1983, and the payment of future judgments beginning in 1984. See *Evans v. City of Chicago,* 873 F.2d 1007, 1012 (7th Cir. 1989) (*Evans II*); *Evans v. City of Chicago,* 995 F.2d 1393, 1396-1398 (7th Cir. 1993), *vacated and rev'd,* 10 F.3d 474 (7th Cir. 1993) (en banc) (*Evans III*).

As of May 31, 1984, then, the question of injunctive relief appeared to be resolved. The City was subject to the consent decree, and to the best of our knowledge it was complying with the decree. Two additional questions remained before the district court: the question of dam-

ages that the decree had left open, and the question of attorneys' fees. The case returned to the district court in 1987 for computation of damages. Plaintiffs then made a decision that they have surely regretted with the benefit of hindsight: they re-opened the question of liability that this Court had settled in *Evans I*, and they argued that the City's practice of distinguishing between tort judgments and other judgments (known as enterprise and contract judgments) also violated the Equal Protection clause. The district court agreed and expanded the scope of the *Evans I* injunction accordingly. In addition, it awarded damages to the plaintiffs.

The City appealed from the new judgment, challenging both the 1987 rulings and asking this Court to revisit its *Evans I* decision. We noted that the plaintiffs' decision to go beyond the scope of the remand for computation of damages and to reopen the equal protection issue had allowed the City in turn to introduce more evidence explaining its conduct. That new evidence left the Court in substantial doubt as to the correctness of its original decision, which persuaded the Court to invoke an exception to the law of the case doctrine and to reconsider *Evans I*. The result of that reconsideration was the finding in *Evans II* that the City's practice of paying small tort judgments in advance of larger ones was supported by a rational basis. This in turn required a reversal of the earlier finding of an equal protection violation and the damages that had been computed at the second phase of the trial. The Court similarly found that the City's decision to treat tort judgments differently from contract or enterprise judgments was supported by a rational basis. *Evans II* concluded: "[w]e find that the City's failure to establish a single order of payment of all judgment creditors did not violate equal protection. Therefore, the decision of the district court is REVERSED." 873 F.2d at 1018.

Following *Evans II*, on November 27, 1989, the City moved to vacate the 1984 consent decree pursuant to Fed.

R. Civ. P. 60(b)(5), which states that "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." The district court initially granted the motion, but then it reversed itself because it believed the consent decree had also compromised due process claims that were unaffected by this Court's decisions. A divided panel of this Court agreed with the latter holding, 995 F.2d 1393, but its decision was vacated and reversed by the en banc decision in *Evans III*.

Judge Easterbrook's opinion for the plurality of the en banc Court did not rest on the proposition that the plaintiffs' claims were frivolous, or that the consent decree had somehow never existed. To the contrary, he stated squarely that "[t]he decree was properly supported when the district court entered the injunction in 1984." *Evans III*, 10 F.3d at 480. Once *Evans II* had been decided, however, the "substantial basis" in federal law for the consent decree evaporated, both under the Equal Protection clause and under the Due Process clause. This meant, in the language of Rule 60(b)(5), that it was "no longer equitable" that the consent decree should continue. Judge Ripple concurred, stating that "it is sufficient to conclude that this court's decision in [*Evans II*] changed the prevailing law to such a degree as to make further enforcement of the consent decree by the district court inappropriate under the standards set forth by the Supreme Court in *Rufo v. Inmates of the Suffolk County Jail*, [502 U.S. 367] (1992)." *Evans III*, 10 F.3d at 483.

Once again, the case returned to the district court. On June 29, 1994, in compliance with this Court's mandate, the court granted the City's motion to vacate the consent

decree and reserved ruling on plaintiffs' motion for attorneys' fees under § 1988. On November 9, 1994, the court entered the order from which plaintiffs appeal, denying attorneys fees. In its order, the district court made it clear that it regarded the question as a close one:

> There can be no doubt that the plaintiff classes derived great benefit while the consent decree was in effect and that, to the extent the City continues to pay judgments in accordance with the procedures established by the vacated decree, judgment creditors of the City will continue to benefit indefinitely into the future. Nor is there any doubt that plaintiffs' counsel expended enormous amounts of time and energy in pursuing the claims which led to these results.
>
> However, while the matter is hardly free from doubt and will obviously be presented to the Court of Appeals for resolution, it appears to this Court that the City is correct in its contention that, having ultimately lost the case, plaintiffs cannot be considered prevailing parties. *See Palmer v. City of Chicago*, 806 F.2d 1316, 1322-23 (7th Cir. 1986).

True to the district court's prediction, both the Evans and the Balark plaintiffs promptly appealed to this Court.

II

Plaintiffs present two alternative theories in support of their claim for attorneys' fees under § 1988, either one of which would support an award. First, they assert that they were both in fact and in law "prevailing parties" during the period of time that the consent decree was in force. Second, they argue that they qualify under the "catalyst theory" for fees, because their case caused the City to act voluntarily in changing its payment practices and the City's action was not wholly gratuitous. The City's response boils down to a simple proposition: if, at the end of the day, plaintiffs cannot point to an extant

injunction, consent decree, order requiring payment of damages, or other tangible evidence of victory, then they cannot be considered winners. Even more directly put, the City argues that if, at the time the fee petition is considered by the district court, plaintiffs have not ultimately prevailed, then fees should not be awarded under § 1988. Because we conclude that plaintiffs were indeed prevailing parties due to their success in obtaining the consent decree, we have no need here to address the alternate "catalyst" theory.

In order to decide this case, we must put ourselves back in the position the parties held from the time the consent decree was entered in 1984 until it was vacated in 1994. During that period, the decree was more than a simple agreement between the parties. It was, as the Supreme Court noted in *Rufo*, 502 U.S. at 378, "an agreement that the parties desire and expect will be reflected in and be enforceable as a judicial decree that is subject to the rules generally applicable to other judgments and decrees." Quoting *Railway Employees v. Wright*, 364 U.S. 642, 650-651 (1961). Like any other judicial decree, this one was entitled to respect; the parties had an obligation to comply with it even if they thought it was erroneous, see *Walker v. City of Birmingham*, 388 U.S. 307, 320-321 (1967), and violations were punishable by contempt, like violations of other court decrees. See *Green v. United States*, 356 U.S. 165, 169 (1958); *Retired Chicago Police Association v. City of Chicago*, 76 F.3d 856, 870 (7th Cir. 1996); *Association of Community Organizations for Reform Now (ACORN) v. Illinois State Board of Elections*, 75 F.3d 304, 306-307 (7th Cir. 1996). Also, as the Supreme Court underscored in *Rufo*, consent decrees are just as subject to Rule 60(b) as other judicial decrees.

To understand our result in this case, it is important to recognize that all final judgments, orders, and decrees are subject to the safety valve provided by Rule 60(b). The fact that a court may exercise an extraordinary power

to relieve the parties of a judgment's consequences, either through a modification or a termination of the decree in question, does not make the judgment any less final. We have often noted, in orders affirming district court refusals to grant relief under Rule 60(b), how limited its scope is and how unusual the circumstances must be in order to justify relief. *Provident Savings Bank v. Popovich*, 71 F.3d 696, 698 (7th Cir. 1995); *Dickerson v. Board of Education*, 32 F.3d 1114, 1116 (7th Cir. 1994); *Harold Washington Party v. Cook County, Illinois Democratic Party*, 984 F.2d 875, 879 (7th Cir. 1993). An order under Rule 60(b) does not in any way call into question the validity of the judgment or decree from the time of its entry up until the time of the 60(b) order. The 60(b) order operates prospectively only, as the language of the rule itself makes clear.

Rule 60(b) orders are thus distinguishable in a critical sense from revisions of orders or judgments during the process of a direct appeal. If a district court judgment is reversed on appeal, the effect of the appellate court ruling is that the judgment was never correct to begin with. If a judgment has been paid immediately, it must be refunded. This is why devices such as supersedas bonds and injunctions or stays pending appeal exist: so that the parties can protect their respective positions while the fate of the district court judgment is still uncertain. In the case of final judgments embodying injunctive relief, the injunction governs the parties' behavior unless and until it either expires of its own force or relief under Rule 60(b) is granted. The same holds true for consent decrees. Sometimes decrees are rather short in duration, such as the 6½ year consent decree entered in *United States v. Microsoft*, 56 F.3d 1448, 1452 (D.C. Cir. 1995), while in other cases they can last for decades. See *United States v. Eastman Kodak Co.*, 63 F.3d 95, 97 (2d Cir. 1995) (decree lasted 73 years: from 1921 to 1994). The fact that the decree may eventually expire or may be modified or terminated pursuant to Rule 60(b) does not mean that it was not valid while it lasted.

With this in mind, we turn to the question whether these plaintiffs were "prevailing parties" for purposes of § 1988, and as such entitled to attorneys' fees. At an obvious level, as the district court recognized, plaintiffs qualify easily: they obtained a consent decree that was in force for ten years; the decree addressed precisely the concerns they had brought before the district court about the way in which the City was paying judgments; and the City changed its behavior, perhaps permanently. We must therefore consider whether anything exists that would defeat their ability to collect fees. The City raises a number of possibilities, which we discuss in turn: (1) the 1984 consent decree did not resolve all issues in the case, because the damages question was expressly reserved; (2) the ground on which this consent decree was eventually vacated is critical, because this Court concluded in *Evans II* that its legal ruling in *Evans I* had been in error, thus suggesting that the decree was void *ab initio*; and (3) this consent decree was in substance an interlocutory order, indistinguishable from others in more conventional litigation.

The City is of course correct to point out that the 1984 settlement did not resolve all issues in the case. As is often true, the plaintiff classes were seeking both prospective changes in the City's payment practices and damages for individual judgment creditor class members who had waited too long for satisfaction. Following *Evans I*, the consent decree settled the first type of claim and left the second for further proceedings. The Supreme Court has addressed the standard for determining when a party has "prevailed" in multiple issue cases on two occasions. In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Court considered the case of patients in a state mental institution who had challenged six general types of practices. In five of those six areas, the district court found that the conditions violated the Constitution and it granted relief; in the sixth, plaintiffs were unsuccessful. Where the plaintiffs' various claims arise out of a common core of facts

and involve related legal theories, the most critical factor is the degree of success obtained. Importantly, the question of degree goes to the determination of the size of the fee, not to the eligibility for an award at all. Thus, *Hensley* made it clear that fees could and should be awarded under § 1988 in cases where plaintiffs prevail on some but not all claims. The Court reiterated this holding in *Texas State Teachers v. Garland Indep. School Dist.*, 489 U.S. 782 (1989), which rejected a requirement that the party have won on the "central issue" in the litigation and reconfirmed that "[i]f the plaintiff has succeeded on any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit, the plaintiff has crossed the threshold to a fee award of some kind." 489 U.S. at 791-92 (internal quotations omitted). See also *Farrar v. Hobby*, 506 U.S. 103, 111-112 (1992).

Garland also reconfirmed the validity of fee awards for interim rulings in litigation, as long as those rulings reflect the party's success in establishing its entitlement to some relief on the merits. *Garland*, 489 U.S. at 790. As devices such as Fed. R. Civ. P. 54(b) reflect, it is quite possible that a district court might resolve some of the claims of some of the parties before it enters a final judgment. (District courts are never *required* to enter Rule 54(b) orders.) These kinds of interim rulings can confer "prevailing party" status on a civil rights plaintiff. In light of these decisions, the fact that further proceedings were required for the damages claims does not undermine plaintiffs' status as prevailing parties for the consent decree on injunctive issues.

Next, we consider whether the fact that the Rule 60(b)(5) relief was granted in part because of a change in the law of this very case compels a finding that plaintiffs did not prevail. The rule itself draws no distinction between relief due to changed facts as opposed to changes in law, except to disadvantage motions based upon newly discovered evidence by subjecting them to a one-year

time limit. Rule 60(b)(5) singles out as one reason for relief the fact that "a prior judgment *upon which it is based* has been reversed or otherwise vacated," which indicates that changes in the law of the case may not be as unusual as the City would have us believe. The kind of change in law that led this Court to reconsider *Evans I* is not uncommon. In *Rufo*, the leading case on modifications of consent decrees under Rule 60(b)(5), the Supreme Court expressed concern about preserving flexibility in institutional reform litigation. Changed factual conditions might make compliance with a decree substantially more onerous, 502 U.S. at 383, or "modification of a consent decree may be warranted when the statutory or decisional law has changed to make legal what the decree was designed to prevent," *id.* at 388. A decree could also be modified "if the parties had based their agreement on a misunderstanding of the governing law." *Id.* at 390.

We therefore see nothing exceptional in the fact that the Evans-Balark consent decree was terminated following a decision of this Court that either applied a new legal standard (a more lenient "rational basis" test) to the City's conduct, or that clarified an earlier misunderstanding of the applicable law (if *Evans I* is better characterized as a simple mistake). Rule 60(b)(5) exists for precisely these situations, and it was properly invoked here.

Finally, we turn to the argument the City urges most strongly, which is that in substance we have a single unified proceeding that plaintiffs ultimately lost. Thus, it argues, this case is exactly like *Hewitt v. Helms*, 482 U.S. 755 (1987), and *Palmer v. City of Chicago*, 806 F.2d 1316 (7th Cir. 1986). In *Hewitt*, Justice Scalia posed the question whether "a party who litigates to judgment and loses on all of his claims can nonetheless be a 'prevailing party' for purposes of an award of attorney's fees," and unsurprisingly answered "no." 482 U.S. at 757, 763. *Palmer* was similar: in that case, the district court awarded interim attorney's fees to the plaintiffs for successfully obtaining a preliminary injunction, but after this

Court threw out the injunction on direct appeal, it was clear that they had not prevailed. This meant that the district court's order to the City to pay the fees had to be set aside as well. 806 F.2d at 1324.

If the City, instead of accepting the consent decree in 1984, had litigated and lost, and if the district court had then entered an injunction identical to the decree, and if the City had then taken an appeal to this Court from the entry of the injunction, and if that appeal had resulted in the functional equivalent of *Evans II*, then we agree that *Hewitt* and *Palmer* would provide the rule of law for this case, too. Nonetheless, this string of "ifs" is not what happened. Instead, in an atmosphere of legal uncertainty both about the Due Process claim and about the extent of its obligations under the Equal Protection clause, the City reasonably enough decided that a compromise was preferable to litigation. It signed the consent decree, and, for the reasons we noted at the beginning of this opinion, the decree became the equivalent of a judicial decree once the district court entered it. It is this fact—the fact of the conclusion of this portion of the litigation through the entry of a consent decree—that distinguishes the present case from others in which parties that "lose" on all their claims seek fees.

Far from losing on all their claims, plaintiffs worked for and won a consent decree that remained in force for a decade. The City invites us to take an *ex post* view of all consent decrees (and injunctions, we suppose), and to deny attorney's fees whenever subsequent events cause a court to set the decree aside in whole or in part under Rule 60(b). Such a rule would seriously undermine § 1988 in consent decree cases, however, and we decline to take such a step. Imagine a consent decree entered in 1986 that is set aside for a combination of changed law and equities in 1996. Assume also that the district court acted reasonably promptly and issued an order awarding fees related to the 1986 decree in 1987. Under the rule the

City proposes, must the attorneys refund the fees in 1996? How can one say that the plaintiffs did not prevail when their decree governed the parties' behavior for ten years, and the termination is prospective only? The only possible perspective from which the entitlement to fees can be considered is at the time the final judgment determining who prevails is entered (taking into account any appeals in accordance with *Palmer*).

From that perspective, these plaintiffs are entitled to their fees. It is important to note that both sets of plaintiffs make clear in their briefs in this Court that the fee request pertains only to time spent from November 4, 1977, to the time when the consent decree was entered, on May 31, 1984, and perhaps some limited time spent monitoring the decree during its existence. It is also interesting that the City is not seeking to recover the $60,000 interim fee award that has already been paid to the Balark plaintiffs' lawyers, although the logic of its argument would seem to compel just such an action on behalf of the taxpayers of Chicago. Finally, the City concedes in its brief that "had plaintiffs chosen to petition for fees after entry of the consent decree, citing that achievement as a basis for a fee award, the district court may well have granted them fees under *Maher v. Gagne* [448 U.S. 122 (1980)]." The City's only error is in assuming that the fee petition is different, as a matter of law, because the district court considered it after the decree had been terminated under Rule 60(b)(5). It is not, and plaintiffs are entitled to the fees that relate to their success in obtaining a ten-year consent decree.

The judgment of the district court is REVERSED and the case is remanded for further proceedings consistent with this opinion.

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Nos. 77 C 4419
79 C 1939
79 C 2493
Consolidated

SYLVIA EVANS, *et al.*,
Plaintiffs,
v.
CITY OF CHICAGO, *et al.*,
Defendants.

BERTHA BALARK, *et al.*,
Plaintiffs,
v.
CITY OF CHICAGO, *et al.*,
Defendants.

CURTIS COLLUM, *et al.*,
Plaintiffs,
v.
CITY OF CHICAGO, *et al.*,
Defendants.

ORDER

Plaintiffs in these consolidated cases move for an award of attorneys' fees on the ground that they are prevailing parties within the meaning of 42 U.S.C. § 1988. They argue that, notwithstanding the holding in *Evans v. City of Chicago*, 10 F.3d 474 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 1831 (1994) ("Evans III"), which set aside the consent decree, they should still be regarded as pre-

vailing parties during the ten years the consent decree was in effect and, alternatively, should be regarded as "catalysts" in causing the City of Chicago to make what appears to be a permanent change in its method of paying judgments.

There can be no doubt that the plaintiff classes derived great benefit while the consent decree was in effect and that, to the extent the City continues to pay judgments in accordance with the procedures established by the vacated decree, judgment creditors of the City will continue to benefit indefinitely into the future. Nor is there any doubt that plaintiffs' counsel expended enormous amounts of time and energy in pursuing the claims which led to these results.

However, while the matter is hardly free from doubt and will obviously be presented to the Court of Appeals from resolution, it appears to this court that the City is correct in its contention that, having ultimately lost the case, plaintiffs cannot be considered prevailing parties. *See Palmer v. City of Chicago,* 306 F.2d 1316, 1322-23 (7th Cir. 1986).

The motions of the Evans and Balark plaintiffs for awards of attorneys' fees pursuant to 42 U.S.C. § 1988 are denied.

ENTER:

/s/ John F. Grady
JOHN F. GRADY
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SEVEN CIRCUIT
CHICAGO, ILLINOIS 60604

Submitted
Decided May 2, 1996

Before

HON. FRANK H. EASTERBROOK, *Circuit Judge*
HON. DIANE P. WOOD, *Circuit Judge*
HON. TERENCE T. EVANS, *Circuit Judge*

Nos. 95-1181 & 95-1182

BERTHA BALARK, *et al.*,
Plaintiffs-Appellants,
v.
CITY OF CHICAGO,
a municipal corporation, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
Nos. 77 C 1939, 79 C 2493 & 79 C 4119
John F. Grady, Judge

ORDER

On consideration of the petition for rehearing and suggestion of rehearing *en banc* filed by counsel for the de-

fendants-appellees in the above-entitled cause on April 19, 1996, all members of the original panel have voted to DENY a rehearing, and no [1] judge in regular active service has requested a vote on the suggestion for rehearing *en banc*. Accordingly,

IT IS ORDERED that said petition for rehearing be, and the same is hereby, DENIED.

---

[1] Honorable Joel M. Flaum did not participate in the consideration of this petition.

Supreme Court, U.S.
FILED
OCT 16 1996
OFFICE OF THE CLERK

No. 96-167

In The

Supreme Court of the United States

October Term, 1996

CITY OF CHICAGO,

Petitioner,

v.

SYLVIA EVANS,

Respondent.

CITY OF CHICAGO,

Petitioner,

v.

BERTHA BALARK, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT, SYLVIA EVANS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN BERNARD CASHION
33 North LaSalle Street
Chicago, Illinois 60602
312/368-0191

Attorney for Respondent Sylvia Evans

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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STATEMENT OF THE CASE

There are four separate opinions of the Court of Appeals in *Evans v. City of Chicago.* They are reported at 689 F.2d 1286 (7th Cir. 1982) (EVANS I); 873 F.2d 1007 (7th Cir. 1989) (EVANS II), 995 F.2d 1393 (7th Cir. 1993) (*reh'g en banc granted and vacated*) (EVANS III); and 10 F.3d 474 (7th Cir. 1993) (EVANS IV).

For this appeal, the critical junction is EVANS II. EVANS I dealt with a trial court finding that there had been both equal protection and due process violations and entry of a partial Summary Judgment in favor of the plaintiff class representatives, leaving open the question of damages. EVANS I affirmed the equal protection issue, found it unnecessary to reach the due process issue, and remanded the due process issue to the trial court for further proceedings. Thereafter, a consent decree was entered into on May 31, 1984. The decree remained in force until EVANS III held that it was appropriate to vacate the decree because of the decision in EVANS II. After the entry of the consent decree there was then a trial on damages. In the trial the plaintiffs introduced evidence and asked the trial court to confirm the due process issue, which it did, expressly finding that there was a due process violation. The trial court entered a judgment with findings of fact and conclusions of law and allowing damages to the plaintiff class members. Prior to trial the parties had entered into a stipulation containing a formula for payment of damages. The formula was keyed to a computer database which had been established, and depended upon what findings the trial court made with respect to a starting point for calculating interest, and other findings. When the City appealed from

this judgment, EVANS II held that the additional evidence at trial invoked an exception to the "law of the case" doctrine and thus had reopened the equal protection issue, and reversed the EVANS I holding on that issue. With respect to the due process issue, the EVANS II court noted in a footnote that this issue "has not survived to this stage of the litigation." (FN 15 at 873 F.2d 1018) On this point, never briefed and never argued, the apparent theory, although unarticulated in EVANS II, was that plaintiffs should have argued the due process issue in their Briefs, even though the trial court had ruled in their favor on it. So the due process issue died and was laid to rest in an unmarked grave.

There is no question but that after the decision in EVANS I the due process issue, unresolved at the time, originally was a basis for the settlement embodied in the consent decree. EVANS II removed the due process issue from further consideration in this litigation on the basis that plaintiffs had mistakenly waived the issue by failing to raise it on appeal. For that reason, it arguably was appropriate to hold in EVANS III that without any existing constitutional violation to support the consent decree, the contractual aspect of the decree was insufficient to support its continued existence, and therefore it was appropriate to vacate the decree.

ARGUMENT: WHY THE PETITION SHOULD NOT BE GRANTED

There are five recent Supreme Court decisions involving attorney fee awards under the Federal Civil

Rights Act: *Hewitt v. Helms*, 482 U.S. 755, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987); *Rhodes v. Stewart*, 488 U.S. 1, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988); *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989); *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992); *Shalala v. Schaefer*, 509 U.S. 292, 113 S.Ct. 2625, 125 L.Ed.2d 239 (1993).

EVANS IV is but one of a string of decisions in the lower federal courts which have interpreted these five Supreme Court decisions in a generally uniform manner. *Wilder v. Bernstein*, 965 F.2d 1196 (2d Cir. 1992) involved a settlement which was modified as a result of the efforts of certain intervenors. The district court had found that a "material alteration in the legal relationships of the parties in a manner that Congress sought to promote in § 1988 had therefore been effected." (725 F.Supp. at 1332). In its decision the Second Circuit observed: (at 965 F.2d 1202)

> The fact that a claim has been resolved by settlement, as in this case, does not preclude a finding that intervenors are prevailing parties; it is plain that a party may prevail when it vindicates rights-regardless of whether there is a formal judgment-through a settlement of consent judgment. *See, e.g., Hewitt v. Helms*, 482 U.S. 755, 760-61, 107 S.Ct. 2672, 2675-76, 96 L.Ed.2d 654 (1987); *Maher v. Gagne*, 448 U.S. 122, 129, 100 S.Ct. 2570, 2577, 65 L.Ed.2d 653 (1980); *Koster v. Perales*, 903 F.2d 131, 134 (2d Cir. 1990); Senate Report at 5, reprinted in 1976 U.S. Code Cong. & Admin.News at 5912.

In *Koster v. Perales,* 903 F.2d 131 (2d Cir. 1990) plaintiffs who obtained a settlement agreement affecting emergency housing were held entitled to fees. And in *Heldman v. Sobol,* 846 F.Supp. 285 (SDNY 1994) judgment in favor of a parent for attorney's fees was approved although the parent's suit was not the "primary trigger" for a change in the law, but had a definite effect in producing "a resolution of the dispute which changes the legal relationship" and the court further stated: (at 846 F.Supp. 288):

> The portion of a party's fees which may be recovered from the adversary must be calibrated to reflect the importance of the party's contribution to the ultimate result, and the aspects of the litigation effort which made that contribution. An all-or-nothing criterion is not to be applied under these circumstances. See *Farrar v. Hobby,* ___ U.S. ___, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992); Callier, "When the Winning Party is Not the Prevailing Party," 66 Tul.L.Rev. 2067 (June 1992). It is increasingly recognized that events often do not always fit into neat "Yes or No" categories, and instead may fall on a spectrum between these extremes. See *United States v. Reliable Transfer Co.,* 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975); *TIAA v. Coaxial Communications,* 799 F.Supp. 16 (S.D.N.Y. 1992); Holmes, "Law in Science-Science in Law," 12 Harv.L.Rev. 433 (1899), also in O.W. Holmes, *Collected Legal Papers* 210-43 (1921); Trevaskis, "Measure of Damages for Regulatory Takings," 3 Probate & Property No 2 at 17 (ABA Mar./Apr. 1989).

See also, *Lyte v. Sara Lee Corp.,* 950 F.2d 101, 104 (2d Cir. 1991)

A consent decree, to justify a fee award must meet certain requirements:

> 1. The changes achieved by the decree must be more than "de minimis" or "technical." *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792, 109 S.Ct. 1486, 1494, 103 L.Ed.2d 866 (1989) (holding a "prevailing party" under § 1988 need only succeed on "any significant issue" that achieves some of the benefit sought by the lawsuit).
>
> 2. The constitutional claims must be at least "colorable." at the time the decree is entered. In *Kasper v. Board of Election Commissioners*, 814 F.2d 332, 342 (7th Cir. 1987) the court speaks of " . . . a demonstration of at least a probable violation of that law as a condition to the entry of that decree." [In EVANS III the plurality opinion says: "The decree was properly supported when the district court entered the injunction in 1974." (10 F.3d at 480)]
>
> 3. The decree must have a legal basis which authorized the entity to assent to such an agreement. *Dunn v. Carey*, 808 F.2d 555 (7th Cir. 1986)

None of these conditions precedent are lacking in the case at bar or challenged by the City of Chicago. Although *Heldman v. Sobol, supra,* stated that " . . . events often do not always fit into neat "Yes or No" categories, and instead may fall on a spectrum between these extremes", the City of Chicago argues for a rule which requires a consent decree plaintiff to win all future controversies after the decree entry, or be barred from any fees whatever, a sort of 'all or nothing' approach. EVANS IV points out that this approach creates a major problem in fee

awards. If a defendant agrees to settle a civil rights action in a consent decree, at that point the plaintiff has prevailed. The defendant could have eschewed settlement, followed the litigation further, and perhaps ultimately prevailed itself, but did not. After the consent decree settlement, the plaintiff is entitled to attorneys' fees relating, at a minimum, to success in procuring entry of the decree. At that point, plaintiff's counsel is entitled to be paid interim fees, as the EVANS IV court points out. If the rule argued for by the City of Chicago is adopted, the effect on the "private attorneys general" aspect of civil rights litigation would be harsh, even disastrous. Under the City of Chicago theory, could a defendant argue to the trial court for a delay in payment of a plaintiff's attorneys' fees on the basis that some future change in the law, or in the factual circumstances supporting the decree, claimed to be perhaps imminent, may be sufficient to deny payment of interim fees for the work done to obtain the consent decree? Of course, this sounds like a foolish argument, because, if some such impending *deus ex machina* were waiting just offstage, no sensible defendant should have settled in the first place. But you can bet such an argument would be made, and some courts might go for it. The argument to pay no interim fees may fly while a consent decree defendant appeals. Can a person or entity who is party to a consent decree have a change of heart and directly appeal from its entry? The answer is probably: Yes. In *Myers v. Gilman Paper Corp.*, 544 F.2d 837, 550 F.2d 41 (5th Cir. 1977), *cert. dis'd*, 434 U.S. 801, the court held that injunctive provisions in a consent decree were adjudicative and immediately appealable under 28

U.S.C. § 1292(a)(1). In EVANS III, the author of the plurality opinion speaks of the consent decree in terms of the City "knuckling under to the inevitable." (10 F.2d at 476). This is hardly true if the City has a right to change its mind and appeal from entry of the decree. And, as stated, the City could have played out its hand and never settled, maintaining all rights of appeal and taking every appeals course open to it without entering into any settlement whatever. If the appeal were then won by the City on the issues incorporated in the consent decree, no fees would have been forthcoming. But that is not what happened.

The Evans consent decree was prevailing law after Evans I until Evans II was decided. Justice Ripple, concurring in the Evans III plurality, said: (10 F.2d at 483)

> * * * "The plurality opinion writes more broadly than is necessary to decide the case before us. . . . For the present, it is sufficient to conclude that this Court's decision in *Evans v. City of Chicago,* 873 F.2d 1007 (7th Cir. 1989) (*Evans II*), changed the prevailing law to such a degree as to make further enforcement of the consent decree by the District court inappropriate under the standards set forth by the Supreme Court in *Rufo v. Inmates of the Suffolk County Jail,* ___ U.S. ___, 112 S.Ct. 748, 762-64, 116 L.Ed.2d 867 (1992). * * *

The Supreme Court has observed in *Missouri v. Jenkins,* 491 U.S. 274, 283-284 (1989) what problems can exist for civil rights plaintiffs' counsel with respect to delay in payment of fees; in footnote 6 the court stated:

> * * * . . . the prospect of such hardship could well deter otherwise willing attorneys from accepting complex civil rights cases that

> might offer great benefit to society at large: this result would work to defeat Congress' purpose in enacting Section 1988 of "encourag[ing] the enforcement of federal law through lawsuits filed by private persons.

A settlement embodied in a consent decree is always subject to being vacated under Rule 60(b), as announced in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 112 S.Ct. 748, 757, 116 L.Ed.2d 867 (1992). Vacation of a decree can occur in all of the various alternative ways discussed in *Rufo*. If vacation occurs because the factual conditions the decree sought to affect had been totally rectified, and such a salubrious result occurred before attorney's fees were awarded, would this mean that no fees should be awarded? Where the law charged after the entry of the consent decree but before an award of attorney's fees, does that wipe out any and all possibility of attorney's fees? As in EVANS, where plaintiffs lost the right to argue the due process issue as an underpinning of the consent decree because of failure to cross-appeal in EVANS II, does that eradicate the substantial achievement represented by entry of the decree?

CONCLUSION

For the reasons stated, it is preferable to let EVANS IV stand. There is no driving necessity, as a matter of the Supreme Court's supervision of the lower federal court's interpretation of the five Supreme Court decisions noted here, to change the interpretation currently represented by EVANS IV and other similar decisions which announce the same principles. Procuring a consent decree

settlement ought of itself to allow fees to a plaintiff's attorney for at least that aspect of the work, which is all that is at issue here. The Petition for Certiorari should be denied.

Respectfully submitted,

JOHN BERNARD CASHION
33 North LaSalle Street
Chicago, Illinois 60602
312/368-0191

Attorney for Respondent
Sylvia Evans

(3)

Supreme Court, U.S.
FILED
NOV 1 1996
CLERK

No. 96-167

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

CITY OF CHICAGO

Petitioner,

v.

SYLVIA EVANS
AND BERTHA BALARK et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF THE BALARK RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD T. STEIN*
3 First National Plaza
Suite 3800
Chicago, Illinois 60602
(312) 558-3164

CECILE L. SINGER
122 South Michigan Avenue
Suite 1850
Chicago, Illinois 60603
(312) 427-3200

Attorneys for Balark Respondents

***Counsel of Record**

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QUESTIONS PRESENTED FOR REVIEW

1. Are civil rights plaintiffs who secure a consent decree that forces a municipality to end its policy of delay in paying judgments divested of their prevailing party status when, after having been in effect for ten years, the consent decree is vacated pursuant to Rule 60(b) of the Federal Rules of Civil Procedure?

2. Did the Seventh Circuit err in its 1993 decision to vacate the consent decree that had been entered in this case in 1984?

No. 96-167

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

CITY OF CHICAGO

Petitioner,

v.

SYLVIA EVANS
AND BERTHA BALARK et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION OF THE BALARK RESPONDENTS

The Balark respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the Seventh Circuit's opinion in this case, reported at 81 F.3d 685 (7th Cir. 1996).

STATEMENT

This case has made five appearances before the Court of Appeals for the Seventh Circuit. The first appearance followed the granting of partial summary judgment in favor of respondents on January 28, 1981. The Court of Appeals affirmed the district court's opinion that the City's practice of paying $1,000 and under tort judgments before larger ones violated the equal protection clause. *Evans v. City of*

Chicago, 689 F.2d 1286, 1299-1300 (7th Cir. 1982) ("*Evans I*"). The district court's judgment that the City's practice also violated the due process clause was vacated as premature, although the court recognized that plaintiffs had a protectible property interest in prompt payment. *Id.* at 1296-99. The due process claims were remanded to the trial court.

On November 12, 1982, after the case was returned to the district court, Balark respondents moved for an award of interim attorney's fees. That motion resulted in an award to Balark respondents of $25,000 as partial interim fees on April 5, 1983. The award, however, was stayed until further order of court.

The parties negotiated a consent decree which was approved by the district court on May 30, 1984. The City agreed to pay all tort judgments in the order in which they were entered, and to pay all judgments promptly. The claims of damages to class members for past delay in paying judgments, as well as attorney's fees, were reserved.

On September 7, 1984, after the consent decree was entered, Balark respondents filed a motion for an award of interim attorney's fees, which, like the earlier motion for interim fees, was opposed by the petitioner, and which, like the earlier motion, remained pending throughout the litigation.

In April, 1987, after the consent decree had been in effect for three years, the City of Chicago voluntarily paid Balark respondents $60,000 in interim fees. Petitioner inaccurately characterizes this voluntary payment as "an award." Pet. 18, n. 5. The court played no role with respect to this payment of interim fees.

A trial on damages proceeded in the district court on October 14, 1987. During the trial, respondents argued that the City irrationally delayed payment of tort judgments while paying other judgments, such as contract claims,

immediately. The district court entered judgment for damages against the City on November 23, 1987, and the City appealed.

Because a new equal protection theory had been argued by respondents in the damage trial, and because the City of Chicago introduced new evidence of its rationale in treating the different categories of judgments unequally, the *Evans II* court revisited the equal protection issue. *See Evans v. City of Chicago*, 873 F.2d 1007 (7th Cir. 1989), *cert. denied*, 495 U.S. 956 (1990) ("*Evans II*"). It overruled *Evans I*, but only with respect to the equal protection holding.

The case returned to the district court, where Balark respondents' motions for attorney's fees were still pending. On December 22, 1987, Balark respondents filed a supplementary memorandum in support of attorneys fees, which related back to the September 7, 1984 pending motion for fees. Respondents claimed they were prevailing parties by virtue of obtaining the consent decree. The City later moved to vacate the decree under Fed. R. Civ. P. 60(b)(5).[1] The district court denied the motion to vacate the decree, but did modify it, finding there to be nothing in *Evans II* that reverses or overrules any due process holding.

---

1. Fed. R. Civ. P. 60 (b)(5) provides, in relevant part:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. . . A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

As modified, the consent decree required the City to pay judgments in the order they are entered. Judgments under $1,000, however, did not need to be paid in order.

The City appealed. The district court was initially affirmed by the majority in *Evans v. City of Chicago*, 995 F.2d 1393 (7th Cir. 1993) *vacated and rev'd*, 10 F.3d 474 (7th Cir. 1993) (*en banc*). After rehearing *en banc*, a fragmented *en banc* court reversed, with the majority holding that the change in prevailing law occasioned by *Evans II* made prospective enforcement inequitable. *Evans v. City of Chicago*, 10 F.3d 474, 483 (7th Cir. 1993) (*en banc*), *cert. denied*, 114 S. Ct. 1831 (1994) (*Evans III*).

After the consent decree was vacated, Balark respondents renewed their motion for attorney's fees. The district court denied the motion, finding that

> [t]here can be no doubt that the plaintiff classes derived great benefit while the consent decree was in effect and that, to the extent the City continues to pay judgments in accordance with the procedures established by the vacated decree, judgment creditors of the City will continue to benefit indefinitely into the future. Nor is there any doubt that plaintiffs' counsel expended enormous amounts of time and energy in pursuing the claims which led to these results.
>
> However, while the matter is hardly free from doubt and will obviously be presented to the Court of Appeals for resolution, it appears to this court that the City is correct in its contention that, having ultimately lost the case, plaintiffs canot be consiered prevailing parties. *See Palmer v. City of Chicago*, 806 F.2d 1316, 1322-23 (7th Cir. 1986).

Pet. App. 15a. Respondents' appeal from this order resulted in the case below, *Balark v. City of Chicago*, 81 F.3d 685 (7th Cir. 1996). Pet. App. 1a-13a.

In the *Balark* appeal, respondents claimed that they were entitled to fees up to the time the decree was entered, under either, or both, of two approaches.

One, they were entitled to a fee award because they had obtained at least some relief on the merits which materially altered the relationship of the parties when they obtained the consent decree. Two, their litigation was the "catalyst" in causing the City to voluntarily change its practice of paying tort judgments, a change which has continued to this date,[2] and one that was not wholly gratuitous. The court below, deciding that respondents were prevailing parties due to having successfully obtained the consent decree, found no need to address the catalyst theory.

REASONS WHY THE PETITION SHOULD BE DENIED

A. The Question Presented by Petitioner Is Not Raised by the Record and Was Not Decided by the Court of Appeals

The sole Question Presented in the petition is

> "whether the entry of a consent decree that is later vacated because it was based on a mistake of law makes a civil rights plaintiff a 'prevailing party' entitled to an award of attorney's fees under Section 1988."

The Seventh Circuit did not decide that question in this proceeding, and the facts of the record will not support a determination of that question here.

---

2. Petitioner concedes that "as a matter of policy, we currently adhere to most of the requirements of the consent decree," although not compelled by the law to do so. Pet. 13.

The question decided by the court was whether respondents are entitled to fees as prevailing parties for wining and maintaining a consent decree, or whether the fact they ultimately lost the decree defeats their claim. *Balark*, 81 F.3d at 660, Pet. App. 2a.

Contrary to petitioner's characterization, the consent decree here was not based on a mistake of law. The decision of the court below was that the decree, "*which was properly supported* when the district court entered the injunction in 1984," was vacated because "'this court's decision in [*Evans II*] *changed the prevailing law* to such a degree as to make further enforcement of the consent decree by the district court inappropriate under the standards set forth by the Supreme Court in *Rufo v. Inmates of the Suffolk County Jail*, [502 U.S. 367 (1992)].'" *Balark*, 81 F.3d 658 (7th Cir. 1996), (citing *Evans III*, 10 F.3d at 483). Pet. App. 5a. (emphasis added).

Petitioner repeatedly misstates the holding of a fragmented *Evans III* court. Five judges constituted the plurality in an opinion authored by Judge Easterbrook. Judge Ripple concurred on narrower grounds. Five judges dissented in two separate opinions.

The concurring opinion by Judge Ripple, thus can be viewed as constituting the holding of the court. *See Marks v. United States*, 430 U.S. 188 (1977). Contrary to petitioner's statement, (Pet. 5), Judge Ripple did not agree that *Evans II* had "repudiated" the equal protection theory. Judge Ripple's concurring opinion states:

> For the present, it is sufficient to conclude that this court's decision in (Evans II), changed the prevailing law to such a degree as to make further enforcement of the consent decree by the district court inappropriate under the standards set forth by the Supreme Court in *Rufo v. Inmates of the Suffolk County Jail*, ___U.S.___,

112 S.Ct. 748, 762-64, 116 L.Ed. 2d 867 (1992).

Evans III, 10 F.3d at 483. *Evans I* was the prevailing law; it was the legal foundation of the consent decree at the time the decree was entered, and it was the law of the Circuit from 1982 until 1989. *Evans II* "changed the prevailing law."

As the court below recognized, "Judge Easterbrook's opinion for the plurality of the *en banc* Court did not rest on the proposition that the plaintiffs' claims were frivolous, or that the consent decree had somehow never existed. To the contrary, he stated squarely that '[t]he decree was properly supported when the district court entered the injunction in 1984.'" *Balark*, 81 F.3d at 661, Pet. App. 5a. Judge Easterbrook, of course, was a member of the *Balark* panel. He did not dissent from the above-quoted passage or from any portion of the opinion of the court below.[3]

---

3. Petitioner makes the waters murky by convoluted quotations. It quotes from Judge Easterbrook's dissent in the vacated opinion without citing the subsequent history of the case, and it does so as to make it appear that the quoted segment comes from *Evans III*:

> As Judge Easterbrook put it in his dissent from the panel opinion in *Evans III*, "[t]he decree was founded on a blunder committed by this court." 995 F.2d at 1404. See 10 F.3d at 476-77 ("[t]his decree is 'based' on *Evans I*") (plurality opinion).

Pet. 14.

Judge Easterbrook, writing for the plurality in *Evans III*, does *not* refer to the decree as being "founded on a blunder . . . " On the contrary, the plurality says it is based on *Evans I*, and as such, it was properly supported when entered.

B. There is No Conflict Among the Circuits

Petitioner treats the consent decree as if it were some kind of interlocutory order, so that it can then argue that the decision of the court below conflicts with decisions of other circuits. A consent decree, however, is not interlocutory in nature. It is a final judgment. *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367. 112 S.Ct. 748 (1992).[4] No appeal was taken from entry of the consent decree.

The court below correctly distinguished Rule 60(b) final judgments embodying injunctive relief and consent decrees from judgments reversed during the process of direct appeal. The fact that a consent decree may eventually be vacated under Rule 60(b) does not mean it was not valid while it existed. *Balark*, 81 F.3d at 663, Pet. App. 8a.

The cases cited by petitioner as conflicting with the instant case involve either interlocutory orders, or cases that were reversed on direct appeal as in *Doe v. Busbee*, 684 F.2d 1375 (11th Cir. 1982) (cited with approval in *Palmer*). They are, thus, distinguishable on their facts and on the law.

In *Doe v. Busbee*, the State of Georgia appealed the district court's granting of summary judgment and injunctive relief. While the appeal was pending, the Supreme Court decided *Harris v. McRae*, 448 U.S. 297 (1980) and *Williams v. Zbaraz*, 448 U.S. 358 (1980) "which substantially undercut the rationale of the district court in entering judgment for plaintiffs." *Doe v. Busbee*, 684 F.2d at 1378. The change in law occurred while the case was still on direct appeal.

---

4. We note that petitioner makes no reference in its Petition to *Rufo*, although that recent case is this Court's most definitive statement on the subject of consent decrees and municipalities.

Petitioner cites five additional cases which are similarly distinguishable. In *Smith v. University of North Carolina*, 632 F.2d 316, 322 (4th Cir. 1980), a preliminary injunction was entered pending trial. The plaintiff lost at trial. On direct appeal, the Fourth Circuit said she could not be deemed a prevailing party because she did not prevail on the merits of at least some of her claims.

It follows that the claimed conflict with *Harrington v. Vandalia-Butler Board of Education*, 585 F.2d 192 (6th Cir. 1978), also involving a direct appeal, does not exist. Nor does a conflict exist with *Palmer v. City of Chicago*, 806 F.2d 1316 (7th Cir. 1986) or *Kansas Health Care Inc., v. Kansas Department of Social and Rehabilitation Services*, 31 F.3d 1052 (10th Cir. 1994) in which preliminary injunctions were reversed or vacated on direct appeal.

In *Stewart v. Donges*, 979 F.2d 179 (10th Cir. 1992), the defendant police officer filed an appeal from denial of his qualified immunity motion. The court denied a stay of the trial pending appeal. After a verdict in plaintiff's favor, the Tenth Circuit decided the appeal, holding that the trial was void, that the court had no jurisdiction to conduct the trial, and that the decision in *Mitchell v. Forsyth*, 472 U.S. 511 (1985) demonstrated that an appeal could be taken under these circumstances. After the case was remanded to the District Court, plaintiff accepted defendant's offer of judgment, petitioned for fees, and was awarded fees for time put in on the case, including that in preparation for, and at trial. On appeal from the award of attorney's fees the Tenth Circuit reduced the fee award, refusing to compensate the attorneys for trial preparation and trial time.

Alioto v. Williams, 450 U.S. 1012,1013-14 (1981) (Rehnquist, J., dissenting from denial of certiorari) is distinguishable in that it raises the question of exposure to attorney's fees where a pending appeal was dismissed as moot. Just as in *Palmer* and *Kansas Health Care Inc.*, the

plaintiffs in that case did not have a legal right to the preliminary injunction. *Id.* at 1322.

This is in contrast to *Balark* respondents, who had a legal right to the injunction they received. The consent decree was vacated because the majority of the *en banc* Seventh Circuit Court of Appeals deemed it no longer equitable that the decree have *prospective* application.

C. The Court Below Correctly Decided the Issues

The court below correctly applied Supreme Court precedent in deciding that plaintiffs are prevailing parties.

In *Farrar v. Hobby*, 506 U.S.103, 113 S.Ct. 566, 573 (1992), this Court synthesized past precedent applicable to the issue of determining prevailing party status as follows:

> Therefore, to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought . . . or comparable relief through a consent decree or settlement . . . Whatever relief that plaintiff secures *must directly benefit him at the time of the judgment* or settlement . . . . Otherwise the judgment or settlement canot be said to 'affec[t] the behavior of the defendant toward the plaintiff.'. . . Only under these circumstances can civil rights litigation effect 'the material alteration of the legal relationship of the parties' and thereby transform the plaintiff into a prevailing party . . . In short, a plaintiff of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.

(Citations omitted) (Emphasis added).

Respondents obtained actual relief on the merits of their claim, which directly benefitted them at the time the consent

decree was entered, and continues to benefit them to this day. "[P]laintiffs worked for and won a consent decree that remained in force for a decade." *Balark*, 81 F.3d at 665, Pet. App. 12a. This is unlike the plaintiff in *Hewitt v. Helms*, 482 U.S. 755, 764 (1987), who received only a favorable judicial statement during the course of his litigation, but no judgment, consent decree, injunction, or other benefit.

This lawsuit and its consent decree undisputably affected the behavior of the City toward the respondents, affording respondents significant relief, *see Rhodes v. Stewart*, 488 U.S. 1, 4, and materially altered the relationship of the parties.

Respondents prevailed on the most significant claim in the case: reform of the City's policy on budgeting for, and promptly paying, tort judgments. Plaintiffs achieved this relief through a consent decree. *See Maher v. Gagne*, 448 U.S. 122, 129 (1980) (fees may be assessed after entry of a consent decree without a determination that plaintiff's constitutional rights had been violated).

The court below noted that petitioner conceded that the district court "may well have granted fees" under *Maher v. Gagne* "had plaintiffs chosen to petition for fees after entry of the consent decree." *Balark*, 81 F.3d at 665, Pet. App. 13a.

Balark respondents did indeed petition for fees after entry of the consent decree, as well as after the favorable Court of Appeals decision in *Evans I*. Petitioner opposed the interim fee petitions and succeeded in convincing the district court to stay ruling on the issue. Unlike petitioner, who could have appealed from entry of the consent decree, but did not, respondents could not appeal from the district court's orders staying the fee petitions because rulings on interim attorney's fees requests are not appealable.

Seeking to ensnare respondents in this Catch 22 situation, and reap a windfall for itself, the City rests its case on a test

for fees that truly turns on a fortuity. It argues that the determining factor for prevailing party status is the *timing* of the attorney's fees award. If the award had been made while the decree was still in force, petitioner would have no quarrel with it, but because it was not made during that period, respondents are no longer prevailing parties. This wreaks havoc on the entire concept of what it means to be a prevailing party.

This Court has commented that the timing of the benefit to plaintiffs ("at the time of the judgment") is a standard determining "prevailing party" status; it should not be the timing of the attorneys fees request or award. *See Texas State Teachers Assn v. Ga. and Indep. School Dist.*, 489 U.S. 785, 792 (1989). The requirement, that the benefit to plaintiffs be at the time of the judgment, underpins the change in behavior of the defendant toward the plaintiff. The court below correctly summed up the issue:

> "[T]he City concedes in its brief that "had plaintiffs chosen to petition for fees after entry of the consent decree, citing that achievement as a basis for a fee award, the district court may well have granted them fees under *Maher v. Gagne*, [448 U.S. 122 (1980)]." The City's only error is in assuming that the fee petition is different, as a matter of law, because the district court considered it after the decree had been terminated under Rule 60(b)(5). It is not, and plaintiffs are entitled to the fees that relate to their success in obtaining a ten-year consent decree.

Balark, 81 F.3d at 665, Pet. App. 13a.

D. The Issues Are Not Important Enough to Warrant Review and Turn upon the Unique Procedural Posture of this Case

The only persons to be affected by the outcome of this case are the parties to it. Petitioner concedes as much in its petition:

> Thus a ruling in this case that further fees need not be paid after the decree is vacated simply will not bear upon these more typical cases in which fees are awarded before the consent decree is vacated.

Pet. 19, and:

> A ruling in this case will not reach cases in which the decree is set aside because of a subsequent change in the law or because it has been effectuated.

Pet. 19.

Petitioner candidly sets forth the only reason why the case is important to it. It does not want to pay fees to the prevailing party. No party and no public body party wants to pay fees, but the fact is that 42 U.S.C. sec. 1988 impacts upon public bodies.

Petitioner incorrectly represents to this Court that it has "been handed a nearly $1 million bill." Pet. 21. It has been handed no "bill." No decision has been made by the court as to how much in fees petitioner must pay. The court below noted, however, that respondents seek fees only to the time the consent decree was entered on May 31, 1984, and perhaps some limited time afterward. *Balark*, 81 F.3d at 665, Pet. App. 13a.

Although it refers to the fee petitions filed in the district court, petitioner neglects to inform this Court that its position in these filings is that respondents are entitled to less than $300,000 in fees, not "nearly $1 million."

E. Respondents Are Prevailing Parties Entitled to an Award of Attorney's Fees on the Alternative "Catalyst" Theory

Under the consent decree petitioner changed its practice and began paying all tort judgments promptly. Because of the practical result obtained by which petitioner permanently changed its practice, respondents were "catalysts" and are entitled to a fee award, having satisfied both prongs of the two-step test utilized in the Seventh Circuit to qualify as prevailing parties.

The lawsuit acted to provoke voluntary action by petitioner, which was (a) causally related to securing relief and (2) "not wholly gratutious", i.e. the plaintiff['s] claim, if pressed, canot have been frivolous, unreasonable, or groundless." *Stewart v. McGinis*, 5 F.3d 1031, 1039 (7th Cir. 1993). Plaintiffs who "attain the relief they seek through a defendant's voluntary action can be prevailing parties for purposes of the civil rights attorney's fees statute." *Zinn by Blankenship v. Shalala*, 35 F.3d 273 (7th Cir. 1994).

The first prong of the "catalyst" test requires a factual showing of a causal link between the case and the relief provided by the City. This was met by the district court's findings. *See* Pet. App. 15a.

The second prong of the test requires a legal showing that respondents' claim had some legal merit. It was met by the *Evans III* court's findings that the consent decree was properly supported when it was entered. *Evans III* at 480.

F. The Consent Decree Should Not Have Been Vacated by the *Evans III* Court

The unique procedural posture of this case was undoubtedly complicated by the *Evans III* majority reaching back to decide a legal issue (the due process claim) that had been settled in the consent decree. *Evans III* attributed a holding

on this issue to the *Evans II* court, even though the due process issue had not been raised, argued to, or decided by the *Evans II* court.

The *Evans III* majority concluded that, *had* the due process issue been raised in *Evans II*, it would have been decided adversely to respondents. As a consequence of this decision, the *en banc* court ordered that the entire decree be vacated, rather than modified to cure the problem created by the change in law related to the equal protection claim.

All five dissenting judges in *Evans III* were of the opinion that the due process claim was settled in the consent decree. "But by its plain terms the consent decree purported to settle the merits both of the equal protection and of the due process claims." *Evans III*, 10 F.3d at 483 (Cudahy, Cummings & Rovner, JJ., dissenting) .

> This Court repudiated the equal protection theory in Evans II, but the due process theory was left intact. Perhaps the majority is correct in speculating that the Evans II court was in no mood to sustain the due process had it the opportunity to pass on it. However, I think it is a wiser practice to limit what we take from a case to what it in fact says, and not to attribute to cases penumbral holdings about wholly distinct and undecided legal theories.
>
> In my opinion a colorable due process theory supported at least part of this decree when it was entered in 1984, and nothing in Evans II or any other case since alters that conclusion.

Evans III 10 F.3d at 485 (Flaum & Kane, JJ., dissenting).

The *en banc* Court failed to follow the dictates enunciated by this Court in *Rufo*, to tailor the modification of the decree to resolve the problems created by the change in circumstances. "A court should do no more, for a consent decree is a final judgment that may be reopened only to the

extent that equity requires." *Rufo*, 112 S. Ct. at 764.

CONCLUSION

Respondents are prevailing parties for having won a consent decree which was in effect for ten years and which permanently changed the petitioner's practice of paying tort judgments. Petitioner has failed to establish any reason which would merit this Court's consideration of their Petition. The Petition for Certiorari should be denied.

November, 1996

EDWARD T. STEIN*
3 First National Plaza
Suite 3800
Chicago, Illinois 60602
(312) 558-3164

CECILE L. SINGER
122 South Michigan Avenue
Suite 1850
Chicago, Illinois 60603

Attorneys for Balark Respondents

*Counsel of Record

No. 96-167

(4)

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

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Petitioner,
v.
SYLVIA EVANS,
Respondent.

CITY OF CHICAGO,
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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR THE PETITIONER

SUSAN S. SHER
Corporation Counsel
of the City of Chicago
LAWRENCE ROSENTHAL
Deputy Corporation Counsel
BENNA RUTH SOLOMON *
Chief Assistant Corporation Counsel
30 N. LaSalle Street
Room 800
Chicago, Illinois 60602
(312) 744-7764
Attorneys for Petitioner
* Counsel of Record

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---

REPLY BRIEF FOR THE PETITIONER

ARGUMENT

Both respondents have ignored the one fact that distinguishes this case from any of the ones they cite in which the courts have awarded attorney's fees under Section 1988. Here, the determination that respondents were "prevailing parties" was made at a time when respondents could point to no judgment of any kind constraining the City's practices in paying its tort judgments. Indeed, the judgment on which they rely to obtain fees—the consent decree—had been vacated because it was based on the

erroneous decision *Evans I* (*Evans v. City of Chicago*, 689 F.2d 1286 (7th Cir. 1982)). Now, although respondents have been in litigation over the City's payment practices for nineteen years, they have absolutely nothing to point to that survived the en banc decision in *Evans III* (*Evans v. City of Chicago*, 10 F.3d 474 (7th Cir. 1993), cert. denied, 114 S. Ct. 1831 (1994))—no declaratory relief, no injunction, no damages, no consent decree. We are, in fact, under no legal compulsion at all to pay our tort judgments in any different manner from the way that we were paying them when this litigation began. These respondents, in short, have failed miserably to obtain "actual relief on the merits of [their] claim[s]" that has "materially altered the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992). See *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 792-93 (1989); *Rhodes v. Stewart*, 488 U.S. 1, 3-4 (1988) (per curiam); *Hewitt v. Helms*, 482 U.S. 755, 760-61 (1987).

To avoid this inevitable conclusion, respondents make no fewer than five attempts to show that they are prevailing parties. First, the Balark plaintiffs assert that "the consent decree here was not based on a mistake of law." Brief of the Balark Respondents in Opposition to Petition for Writ of Certiorari 7 [hereafter "Balark Br."]. This argument appears to be based on some distinction between mistakes of law and rulings that are perceived to be correct when they are entered and later are adjudged to be incorrect—a distinction that escapes us. When Judge Ripple, see *Evans III*, 10 F.3d at 483 (concurring opinion), and the court below in *Evans IV*, see Pet. App. 5a, wrote that *Evans II* (*Evans v. City of Chicago*, 873 F.2d 1007 (7th Cir. 1989), cert. denied, 495 U.S. 956 (1990)), had "changed the prevailing law to such a degree as to make further enforcement of the consent decree inappropriate under" *Rufo v. Inmates of the*

Suffolk County Jail, 502 U.S. 367 (1992), what they meant was that *Evans II* had recognized that the equal protection holding in *Evans I* was so completely incorrect that it could not support the consent decree. Certainly neither Judge Ripple nor the panel below could have meant to suggest that between the 1982 decision in *Evans I* and the 1989 decision in *Evans II* the governing law for equal protection claims changed to a significant degree. Indeed, both *Evans I* and *Evans II* applied the well-settled rational basis test. See *Evans I*, 689 F.2d at 1299; *Evans II*, 873 F.2d at 1015. The only change is that *Evans I* got it wrong and *Evans II* got it right. Respondents cannot plausibly argue that the consent decree was not "based on a mistake of law." The consent decree, after all, was based on *Evans I*, see *Evans III*, 10 F.3d at 476-77 (plurality opinion), and *Evans I* was "clearly erroneous." *Evans II*, 873 F.2d at 1016.

Second, the Balark respondents point out that the judgment entering the consent decree was a final judgment. See Balark Br. 9. Evans makes this same general observation. See Brief of the Respondent, Sylvia Evans, in Opposition to Petition for Writ of Certiorari 8. This, of course, is true, but it does not explain why a final judgment based on a mistake of law—in this case *Evans I*—and vacated because it never should have been entered in the first place should be hardy enough to support a fee award simply because it was once entered. Whatever distinction might exist in other cases for final judgments later set aside under Fed. R. Civ. P. 60(b) and orders set aside on direct review, surely it does not exist here, where the reason the judgment was vacated was neither a change in circumstances nor the accomplishment of the purposes of the decree but simply that the court has seen the error of its ways. Respondents seem to concede the correctness of the cases we cite in which fees are denied for an erroneous interlocutory ruling. The rule should be no different for an error that has achieved finality through no fault of the party aggrieved by that ruling.

Third, and along the same lines, the Balark respondents note that simply because a consent decree is vacated "does not mean that it was not valid while it existed." Balark Br. 9. We have no quarrel with this general proposition, although it has nothing whatever to do with this case. This is just more of respondents' refusal to come to grips with the fact that this consent decree was vacated precisely because it was based on an erroneous ruling and, indeed, should never have been entered in the first place. Even respondents do not argue that this consent decree would have been entered but for the court's error in *Evans I*. In common sense terms, that is a consent decree that was not valid while it existed, even though it was not judicially pronounced invalid for several years.

Fourth, the Balark respondents assert that "[t]his lawsuit and its consent decree undisputably [sic] affected the behavior of the City toward the respondents, affording respondents significant relief, . . . and materially altered the relationship of the parties." Balark Br. 12 (citation omitted). If this is meant to describe the period of time during which the consent decree was in effect, of course we quite agree. If it is meant to have any bearing on respondents' entitlement to fees after the consent decree was vacated as based on a mistake of law, then it is simply incorrect. The legal relationship between the City and respondents is the precisely same now as before respondents brought these lawsuits nineteen years ago—except that we have spent inordinate time litigating claims that have been judged worthless and are now res judicata for respondents and any class member who might seek similar relief in the future. Surely that type of alteration in the relationship of the parties should not be rewarded with fees.

Finally, the Balark respondents argue that our test would make the availability of fees turn on a "fortuity." Balark Br. 12-13.[1] But what respondents call a "fortuity"

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[1] The Balark respondents go so far as to argue that we seek a "windfall." Balark Br. 12. Even if this Court overturns the hold-

is actually the statutory touchstone of prevailing party status. In interpreting that requirement, we do not think it is too much to ask that the plaintiff be able to point to some tangible result in the lawsuit at the time that the district court awards attorney's fees. As we explain in our petition for certiorari, temporary victories are routinely dismissed as insufficient to support a fee award. *E.g.*, *Stewart v. Donges*, 979 F.2d 179, 182 (10th Cir. 1992); *Palmer v. City of Chicago*, 806 F.2d 1316, 1321-23 (7th Cir. 1986), cert. denied, 481 U.S. 1049 (1987); *Doe v. Busbee*, 684 F.2d 1375, 1381 (11th Cir. 1982); *Smith v. University of North Carolina*, 632 F.2d 316, 352-53 (4th Cir. 1980). Indeed, even success not later branded as error is insufficient if it is illusory. See *Rhodes v. Stewart*, 488 U.S. at 3-4; *Hewitt v. Helms*, 482 U.S. at 760; *Ward v. County of San Diego*, 791 F.2d 1329, 1333-34 (9th Cir. 1986); *Harrington v. Vandalia-Butler Board of Education*, 585 F.2d 192, 198 (6th Cir. 1978). Surely if the plaintiff's "success" is founded, as it was in this case, on a mistake of law, and the success achieved longevity measured only by the length of time that it took the court to recognize and correct its error, the plaintiff has not prevailed. The district court was not obliged to shut its eyes to the fact that it had vacated the decree, and to award fees simply because for a few years the consent decree had life and, therefore, at some point in the past plaintiffs had been "prevailing parties." [2]

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ing below that respondents are prevailing parties, we will not think ourselves lucky to have been embroiled in this litigation. This case has brought us no sudden and unexpected good fortune. To the contrary, it has taken a long time and considerable energy to extract ourselves from a case that should have been over long ago.

[2] *Texas State Teachers* is not to the contrary. There the Court explained its reasons for rejecting the central issue test applied by the Fifth Circuit, including that it failed to account for success on an issue *pendente lite*. The Court's statement that "Congress cannot have meant 'prevailing party' status to depend entirely on the timing of a request for fees," 489 U.S. at 791, was therefore intended to accommodate those cases in which the plaintiff "ha[d] succeeded on any significant claim affording it some of the relief

The Balark respondents offer two grounds in support of their judgment that do not relate to the question decided below, but these are insufficient to insulate the judgment from review. First, they argue that attorney's fees can be awarded in this case on the theory that they were the "catalyst" of what they call a permanent change in the City's payment practices. Tellingly they cite no case from this Court for that proposition—this Court has never embraced the notion of a "catalyst" where a lawsuit was said to have caused a change in the defendant's policies. See *Hewitt*, 482 U.S. at 763. In any event, because this theory was never reached by the court below, and respondents cite only cases from that court, this Court should, at a minimum, vacate the judgment below and remand the case to the court of appeals for its consideration in the first instance of respondents' alternative theory.[3]

Finally, the Balark respondents offer the now legally irrelevant notion that the consent decree should not have been vacated in *Evans III*. Respondents did not make this argument to the court below, and they did not ask that court to depart from the law of the case as established in *Evans II* and *Evans III*. The issue is now waived. Nor may respondents seek reinstatement of the decree without a cross-petition, which they did not file. See this Court's Rule 14.1(a).

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sought," *ibid.*, other than in the final judgment. Here, respondents have not succeeded on any of their claims.

[3] Respondents presented their catalyst theory to the court of appeals, which did not reach the question. Pet. App. 7a. Yet it is unlikely that the court below reached out to decide the harder question in the case and bypassed a theory under which respondents would easily prevail. In fact, as we explain in our petition, respondents would not be catalysts under the test used by the Seventh Circuit. See *Palmer v. City of Chicago*, 806 F.2d at 1322. Indeed, *Palmer* makes clear that in cases that have concluded on the merits, a plaintiff who has not altered the legal relationship is not a catalyst either. The catalyst theory, to the extent that it means something other than a change in the legal relationship of the parties, is best reserved for those cases in which the plaintiff prevails before judgment on the merits. See, *e.g.*, *Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978).

In the final analysis, as *Evans II* and *III* make clear, the consent decree here protected no federal rights and was not necessary to restrain any unconstitutional conduct. Thus, the congressional policy of compensating prevailing parties in civil rights cases is surely not at play when a plaintiff in fact vindicates no federal right. Conversely, there is surely serious violence to our system of federalism when local taxpayers must foot the bill for litigation that accomplished nothing but to restrain their elected officials for years because of the erroneous decision of a federal court. Although the Balark respondents question whether the fee award will really be $1 million, see Balark Br. 14, they do not dispute that this is the amount that they and Evans have asked the district court to award.[4] And although they think that this affront, whether it be $300,000 or $1 million, or something in between, is not important enough to warrant review, it is surely grounds for summary reversal—relief that we explicitly suggested and that neither brief in opposition even discusses.

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[4] The district court's determination on the fee petitions would be subject to review only for abuse of discretion. See *Hensley v. Eckerhart*, 461 U.S. 424, 436-37 & n.12 (1983).

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted,

SUSAN S. SHER
Corporation Counsel
of the City of Chicago
LAWRENCE ROSENTHAL
Deputy Corporation Counsel
BENNA RUTH SOLOMON *
Chief Assistant Corporation
Counsel
30 N. LaSalle Street
Room 800
Chicago, Illinois 60602
(312) 744-7764
Attorneys for Petitioner

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* Counsel of Record